ORIGINAL
FILED
MAR 2, 2004
L. Larry Propes, Clerk
Columbia, SC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA NUMBER 3.03-1088	) CRIMINAL
	) 18 U.S. C. § 1343
	) 18 U.S. C. § 11950(h)
v.	) 18 U.S. C. § 2
	)
WILLIAM LUTHER STEWART, a/k/a Luke Stewart, and EDWIN G. BLAIR	)))

SUPERSEDING INDICTMENT

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 1

THE GRAND JURY CHARGES:

1. On or before February 1999, in the District of South Carolina and elsewhere, WILLIAM LUTHER STEWART, also know as Luke Stewart, and EDWIN G. BLAIR did devise and intend to devise a scheme and artifice to defraud and obtain money be means of false and fraudulent pretenses, representations, and promises.

BACKGROUND

2. On or about November 13, 1998 Media Fusion, Corp. was converted to Media Fusion, LLC, a Texas limited liability company. WILLIAM LUTHER STEWART was Chairman and Chief Scientist. EDWIN G. BLAIR was President.

3. On April 23, 1999, an account was opened at Compass Bank, Dallas, Texas, in the name of Media Fusion, LLC.

SCHEME TO DEFRAUD

4. It was part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that Media Fusion had developed a method of power line communication technology to provide voice, video, and data communications over the electric power grid.

5. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that Media Fusion had completed the design and laboratory testing stages of its proprietary network system and was

well positioned to finalize the construction and installation of its first system.

6. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented WILLIAM LUTHER STEWARTs' background and experience with the Massachusetts Institution of Technology (MIT), the Defense Advanced Research Projects Agency (DARPA), Microsoft, and San Diego Gas and Electric.

7. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented WILLIAM LUTHER STEWART was a nominee for the Nobel Peace Prize.

8. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that Media Fusion was associated with, and had a laboratory at the Stennis Space Center, National Aeronautics and Space Administration (NASA).

9. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that money received from SCANA would be spent testing the power line communication technology. Specifically, transmitting a continuous tone over the electrical grid in excess of 500 miles without regeneration by November 30, 1999.

10. On or about March 5, 1999, in the District of South Carolina and elsewhere EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by means of wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, to Texas, a fax containing monthly milestones and budget for Media Fusion; in violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 2

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about March 19, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by means of wire in Interstate commerce from Dallas, Texas, to Columbia, South Carolina, a letter addressed to Jim Burwell, General manager, representing that media Fusion was "setting up our first control center at Stennis and will have offices as NASA working with the Mississippi Enterprise for Technology" with two proposals attached; In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
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OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 3

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about April 7, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, a letter addressed to Robert E. Long, General manager, representing that "based on the investment proposals submitted to SCANA, Media Fusion technology will be ready for commercialization at the end of twelve months from date of funding;" In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 4

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about April 23, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, an e-mail message identifying Media Fusion's bank and account number so money could be sent by wire; In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 5

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about April 26, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Columbia, South Carolina, to Texas $1,000,000.00;
In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 6

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about June 27, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, an e-mail message asking for an additional $1,000,000.00 before July 1, 1999; In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 7

THE GRAND JURY FURTHER CHARGES:

1. From on or about April 28, 1999, though on or about July 30, 1999, in the District of South Carolina and elsewhere, WILLIAM LUTHER STEWART, and EDWIN G. BLAIR unlawfully, knowingly, and willfully did conspire to conduct and attempt to conduct a financial transaction effecting interstate commerce which involved the proceeds of some form of specified unlawful activity, that is, wire fraud in violation of Title 18, United States Code, Section 1343, with the intent to promote the carrying on of the specified unlawful activity; In violation of Title 18, United States Code, Section 1956(h).

A True BILL

s/Marie W. Carter
FOREMAN

S/ J. Strom Thurmond, Jr.
J. STROM THURMOND, JR. (EWR)
UNITED STATES ATTORNEY

COUNT 7, DROPPED AT TRIAL.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL NO.
	)	3:03-1088
v.	)	
	)	
	)	VERDICT
WILLIAM LUTHER STEWART, a/k/a Luke Stewart	)	
	)	
DEFENDANT.	)	FEB && 2005
	)	LARRY W. PROPES
		CLERK COLUMBIA, SC

1. As to Count 1, we, the jury, unanimously find Defendant William Luther Stewart

_____ Not Guilty

___x__Guilty

2. As to Count 2, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

3. As to Count 3, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

4. As to Count 4, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

5. As to Count 5, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

6. As to Count 6, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

United States District Court

DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA

JUDGMENT OF ACQUITTAL

CASE NUMBER
3:03cr1088(02)

v.

EDWIN G. BLAIR

The Defendant was found not guilty. IT IS ORDERED that the defendant is acquitted, discharged, and any bond exonerated.

s/Cameron McGowan Currie
Signature of Judicial Officer

1.

Petitioner's Appeal to the United States Court of Appeals, Fourth Circuit

JURISDICTIONAL STATEMENT

This appeal is properly before this Court pursuant to 28 U.S.C. § 1291, which gives the Court jurisdiction over appeals from criminal convictions in the United States District Courts.

STATEMENT OF THE ISSUES

I. Was there sufficient evidence from which a reasonable jury could find Defendant Stewart guilty on the charges contained in Count I alleging wire fraud

II. Did the District Court err by admitting evidence of correspondence written on behalf of NASA and the United States Attorney for the Southern District of Mississippi to a co-defendant regarding statements contained in a Web page allegedly misrepresenting a relationship between NASA and Media Fusion for the limited purpose of notice when there was no evidence that Stewart made any alleged misrepresentations after the date of the letters

III. Did the District Court err in finding that the amount of loss for purpose of calculating the Sentencing Guidelines was $1 million, when Stewart was acquitted of the count alleging wire fraud pertaining to the $1 million.

STATEMENT OF THE CASE

Stewart and a co-defendant Ed Blair were indicted on March 2, 2004, in a Superseding Indictment alleging Six Counts of wire fraud in violation of 18 U.S.C. § 1343 and One Count of Money Laundering in violation of U.S.C. § 1956(h). Prior to trial, the money laundering count was dismissed and Stewart and Blair were tried on the six wire fraud counts. The jury acquitted Ed Blair on all counts and found Stewart not guilty on Counts II through VI. The jury returned a verdict of guilty on Count I. Stewart filed a post-trial motion for judgment of acquittal under Rule 29, Fed. R. Crim. P., or in the alternative for a new trial under Rule 33, Fed. R. Crim. P. The district court denied both motions and sentenced Stewart to a term of imprisonment of 30 months. Judgment was entered on May 6, 2005 and on this same date the Clerk of Court filed a Notice of Appeal on behalf of Stewart at the direction of the district court. The District Court allowed Stewart to remain on bond pending this appeal.

STATEMENT OF THE FACTS

Appellant Luke Stewart was a shareholder and the chief scientist of Media Fusion, LLC, a Texas limited liability corporation (hereinafter "Media Fusion"). Media Fusion had an impressive cast on its board of directors, including Terry McCauliff, former Chairman of the Democratic National Committee, Bob Livingston, former Chairman of the House Ways and Means Committee and retired Rear Admiral James J. Carey. In addition, Media Fusion had also assembled a powerful cadre of lobbyists, many inside the Washington Beltway, to work with Stewart

and Blair. (JA 102, ll. 16-25 to 108, ll. 1-19; 122, ll. 7-25 to 123, ll. 1-15).

Their goal was to commercialize Stewart's patented technology that enables electrical power grids to transmit voice and data communications. Such power line communication faces a number of technical obstacles, the most significant being the interference of transformers that prevent a communication signal from being transmitted from a power grid to an individual's home or business without disturbance. The Media Fusion technology solved the typical problems with power line communications by inscribing data into the magnetic wave surrounding the electrical grid. (JA 516, ll. 522).

This advanced sub-carrier modulation technology (ASCM), as Stewart named it, is protected by a patent issued by the United States Patent Office that was ultimately obtained by Media Fusion. (JA 446, ll. 6-16; 795 to 813). Power line communication technology has been a passion for Stewart. He has spent years analyzing, developing and testing various technical approaches to solving the problems facing power line communication. Stewart conducted testing of his revolutionary approach to solving the well known problems created by transformer interference in Guatemala. (JA 580, ll. 2-25 to 582, ll. 1-16; 589, ll. 2-19). However, Stewart had never successfully integrated all components of his solution to power line communication. Stewart's solution though integrated various components that had been previously tested and proven in various applications. (JA 582, ll. 24-25 to 585, ll. 1-20).

In an effort to bring this technology to market, Stewart, Ed Blair and Stewart's former fiancé Kathryn

Scoggins Travis, met with a venture capital firm in Dallas, Texas. This firm, MG Capital, first sent Stewart to the Massachusetts Institute of Technology ("MIT") to meet with scientist to have his technology "vetted" for a determination of whether it was commercially feasible before deciding to devote its resources toward raising capital for Stewart and Blair. Following this "vetting," MG Capital representatives agreed to raise capital on behalf of Stewart and Blair's start-up company. Scoggins Travis in a collaborative effort with MG Capital representatives and Stewart and Blair prepared a Power Point presentation to be used to introduce Stewart's technology to prospective investors. (JA 586, ll. 6-25 to 588, ll. 1-20).

In addition, retired Rear Admiral Carey, who had in 1997 provided Stewart and Scoggins Travis with an entre' to an international symposium on power line communication, began a government relations effort in Washington to obtain federal funding and other support for Stewart's technology. Carey assembled a total of 17 lobbyists who assisted with this effort. (JA 102, l. 25 to 108, ll. 1-22; 113, ll. 15-25 to 116, ll. 1-20).

Jim Johnson, a former high level staff member of Senator Trent Lott of Mississippi, was one of the members of this lobbying team and worked with Media Fusion and their efforts to obtain coveted administrative and research space at NASA's Stennis Space Center, in Gulfport Mississippi. Senator Lott was instrumental in having a business incubator established at Stennis for start up companies like Media Fusion to receive technological assistance from NASA scientist. Media Fusion leased administrative office space through a corporation named

Mississippi Enterprises for Technology at the Stennis Space Center (MET). In addition, Media Fusion identified additional space for the construction of a $25 million a research laboratory (JA 108, ll. 23-25 to 109, ll. 1-12; 86, ll. 3-25 to 87, ll. 1-25). Jim Johnson, the former Lott staffer, was also a lobbyist with SCANA, a South Carolina based electric, gas and nuclear utility holding company. Johnson introduced Stewart, Blair and Admiral Carey to SCANA's government relations executives in Washington, D.C. The purpose of this initial meeting was to expose SCANA to the Media Fusion business opportunity. In this initial meeting, SCANA's Jim Burwell and George Bullwinkle met with Luke Stewart, Ed Blair and Admiral Carey. (JA 117, ll. 6-25 to 120, ll. 1-7).

At this meeting, Stewart wore the security clearance badge issued to him for access to the Stennis Space Center. (JA 141, ll. 16-21; 786). In addition, Mr. Bullwinkle claims to have received a draft document that contained the content of Media Fusion's website at either this initial meeting or at another meeting prior to SCANA loaning money to Media Fusion. This document states that Media Fusion "has completed the design, laboratory testing stages of its proprietary network system and is well positioned to finalize the construction, installation testing its first system by the end of 1999. A first generation prototype is being constructed at the John C. Stennis Space Center in Gulfport, Mississippi with the cooperation of NASA…The cost of the build-out is about 15 to 25 million." (JA 692, ll. 13-25 to 703, ll. 1-3) Bullwinkle could not recall who provided a copy of this draft content of Media Fusion's web page and specifically could not state whether Stewart in fact had given

this draft document to him. (JA 714, ll. 18-25 to 715, ll. 1-6). However, the document differed significantly from the final version that was ultimately posted on the Media Fusion web site. (JA 711-714, ll. 1-17).

After the initial meeting with Messrs. Burwell and Bullwinkle, Stewart and Blair traveled to Columbia, South Carolina and met with Bob Long, head of business development at SCANA, Burwell and Oscie Brown, who at the time was a general manager in charge of telecommunications at SCANA. (JA 300, ll. 14-25).

Again, during this meeting, Stewart wore his Stennis security badge issued to him on behalf of Media Fusion for access to the NASA Stennis Space Center. (JA 301, ll. 2-9). In addition, Blair made a comment during this meeting that Stewart "would be a Nobel peace prize winner by this discovery in the technology that he had." (JA 301, ll. 3-9).

Prior to the meeting, Long had also printed out a number of pages from the Media Fusion web page which included statements that "Media Fusion has completed the design and lab testing stages of its proprietary network system." (JA 298, ll. 9-25 to 300, ll. 1-16). The printed web page also stated that "The power grid contains line noise which degrades signals, load and balances which disrupt communications and transformers which screw up harmonics and make signals difficult to control. Media Fusion's technology overcomes these obstacles." (JA 299, ll. 18-23).

After the February 22 meeting, Blair continued to have communications with Bob Long and other representatives from SCANA regarding SCANA's interest in participating financially with Media Fusion's efforts to

commercialize its technology. As part of this process, an attorney from SCANA, Randolph Mahan, drafted and had executed a Mutual Non-Obligation and Non-Disclosure Agreement. (JA 405, ll. 17-25 to 407, ll. 1-15).

The mutual Non-Disclosure and Non-Obligation Agreement provided that either party may disclose confidential information and that any such disclosure shall not obligate Media Fusion or SCANA to pay any money or to enter into any business relationship. (JA 424, ll. 5-25 to 429, ll. 1-18). In addition, the Agreement provides "communications of any kind should not be relied upon as a basis for taking any action, foregoing any opportunity or incurring costs." (JA 426, ll. 1-6). The effective date of this Agreement was March 4, 1999. (JA 422, ll. 24-25).

Following the execution of this Agreement on March 6, 1999, Ed Blair forwarded a faxed transmission to Bob Long setting forth monthly technology milestones for Media Fusion along with a science budget. (JA 772-785). The Monthly Milestones clearly indicated that Media Fusion was seeking funding in order to begin the construction of the primary lab at the Stennis Space Center, fund government relations efforts, purchase server and switching equipment, hire senior engineers and begin construction of a control center." Id.

After receiving the Monthly Milestone and Budget information, SCANA representatives met with Luke Stewart and Ed Blair on April 15, 1999, at SCANA's headquarters in Columbia, South Carolina.

During this meeting, Stewart again wore his security clearance badge issued to him on behalf of Media Fusion by NASA security at Stennis Space Center. Stewart and Blair

met with senior management at SCANA to further explore SCANA's interest in Media Fusion.

At this meeting, Stewart and Blair presented a Power Point presentation stating that Media Fusion has "completed proprietary system design and lab testing." In addition, the Power Point presentation provides some background information on Stewart. Under this section the power point has a category called "Related Experience" and simply lists the following: Massachusetts Institute of Technology, DARPA (which is the think tank for the United States Department of Defense), Microsoft, San Diego Gas and Electric and Claritek. Other than listing this information, there is no evidence that Stewart or Blair expanded upon Stewart's related experience. (JA 32, ll. 12-25 to 34, ll. 1-10). However, in a subsequent deposition given by Stewart to SCANA attorneys in Texas, Stewart explained his connections with these entities. (JA 450-452, 458-459). Also, on or about April 12, 1999, just days prior to the meeting, order begin the construction of the primary lab at the Stennis Space Center, fund government relations efforts, purchase server and switching equipment, hire senior engineers and begin construction of a control center." Id.

SCANA received a resume of Stewart from Media Fusion which listed under the heading "Honorable Mentions" Nobel Nominee List for Medicine 1990. (JA 308, ll. 19-25).

During these initial meetings, SCANA through its point person Bob Long, was aware that the individual components of the Media Fusion technology had previously been tested but that a complete integration had never before

been proven. (JA 355, ll. 14-19). In order to prove or roll-out the Media Fusion technology, Media Fusion was seeking to raise $145 million broken down into three phases: phase one required $25 million to "prove a tone" within 180 days; phase two would require $45 million to complete a system integration with in-home testing and phase three would require $80 million to employ the technology to one million customers. (JA 357, ll. 8-20).

SCANA was unwilling to invest the total $145 million needed for the three phases of the project. However, SCANA did agree to loan Media Fusion one million dollars pursuant to an unsecured note for a period of 120 days dated April 26, 1999. (JA 315, ll. 14-25). SCANA would then conduct a due diligence science review of the technology before deciding to invest additional funds. In addition, SCANA and Media Fusion executed a letter of intent simultaneously with the note wherein SCANA agreed to raise approximately $65 million to complete phases one and two of the project if the due diligence science review was satisfactory. (JA 316-324, 322, ll. 8-21).

SCANA wired one million dollars to Media Fusion on or about April 26, 1999. Two days following the wire transfer, on April 28, 1999, Stewart and Blair met with executives from ITC Delta Com, a telecommunications company in which SCANA had a substantial investment and on whose board SCANA's chairman also served. The meeting was arranged at SCANA's request. Following the April 28 meeting with ITC Delta Com, SCANA executives internally decided to walk away or abort the Media Fusion venture, without telling Media Fusion. (JA 326, ll. 2-7; ll. 23-25, 327, ll. 1-3, ll. 15-22). However, rather than

immediately walking away from this venture SCANA purported to go forward with its "due diligence" examination of the Media Fusion technology by retaining an expert to briefly vet Stewart's technology. In addition, SCANA officials traveled to Stennis Space Center to inspect the site at Stennis.

George Bullwinkle testified that there was nothing at Stennis that raised any "red flags" as to Media Fusion's prior representations about their relationship with NASA or presence at Stennis. (JA 720 ll 13-25; 721 ll 1-5). SCANA however refused to fund the additional $24 million needed for the phase one tone test set forth in the original letter of intent. SCANA however, agreed to remain a strategic partner with Media Fusion and assist Media Fusion with in-kind contributions of services as well as government relations lobbying work in an effort to obtain additional funding for the initial tone test. (JA 788, 789).

Ultimately, Media Fusion was unable to raise the additional money required to do the tone test. When SCANA's note initially came due, SCANA renewed the note for an additional time. (JA 790). When SCANA demanded payment on the note, Stewart had been ousted from Media Fusion and Blair, Carey and others were attempting to license the ASM patent. (JA 507, ll. 23-25 to 509, ll. 1-15; 793). Media Fusion did not re-pay SCANA and SCANA sued Media Fusion and obtained a judgment in United States District Court in South Carolina. During post-judgment collection efforts, SCANA's lawyers deposed Stewart in supplemental proceedings. During this deposition, Stewart was questioned about prior statements he had made pertaining to his patented technology to transmit voice and

data over an electrical grid. In this deposition, Stewart stated that "his technology works up to the point of the transformer, and we're still working on how to grid it." (JA 461, ll. 6-11). Subsequently, Stewart was confronted by an FBI agent unannounced and asked about this deposition testimony. Stewart explained to the agent that he misspoke; that he was supposed to have been afforded an opportunity to proof the deposition and make changes but that had not occurred. Had that occurred he would have changed that statement. (JA 733, ll. 2-19). Stewart also told the agent that "the technology should work and the math and physics were sound." (JA 732, ll. 4-6).

SUMMARY OF ARGUMENT

There was insufficient evidence presented at trial from which a reasonable jury could find Stewart guilty on Count I beyond a reasonable doubt, when the jury acquitted Stewart of the remaining five counts based upon the same allegations in the Indictment. In addition, the District Court abused its discretion by admitting correspondence by NASA officials claiming that Stewart misrepresented Media Fusion's relationship with NASA. This evidence was admitted solely for the purpose of notice, yet there was no evidence that Stewart continued to make the alleged misrepresentations after receipt of the letter. Lastly, the District Court erred by finding that the loss amount for purposes of the sentencing guidelines is $1 million, when Stewart was acquitted of the $1million fraud claim.

ARGUMENTS

I. THE DISTRICT COURT ERRED IN FINDING THAT

THERE WAS SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND THAT STEWART IS GUILTY BEYOND A REASONABLE DOUBT

A. Standard of Review

This Court reviews, de novo, a denial of a Rule 29 motion for judgment of acquittal. *United States v. Alerre*, 430 F.3d 681 (4 Cir.2005); *United States v. Ryan-Webster*, 353 F.3d 353, 359 (4th Cir.2003). In so doing, the Court is obliged to sustain a guilty verdict if, viewing the evidence in the light most favorable to the Government, it is supported by "substantial evidence." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir.1996) (en banc) (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). "Substantial evidence" is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*

B. Argument

Count I of the Indictment, for which Stewart was convicted, referenced the fax transmission dated March 3, 1999, and transmitted from Ed Blair to Bob Long containing the Media Fusion technology Monthly Milestones and Science Budget on March 6, 1999. (JA 302, ll. 17-25 to 303, l. 1). The jury acquitted Stewart of Counts II through VI. Count II referenced a letter dated March 19, 1999, addressed to Jim Burwell representing that Media Fusion was "setting up our first control center at Stennis and we will have offices

at NASA working with the Mississippi Enterprise for Technology" with two proposals attached. Count III referenced a letter addressed to Robert E. Long, General Manager, representing that "based on the investment proposal submitted to SCANA, Media Fusion technology will be ready for commercialization at the end of 12 months from date of funding." Count IV is an e-mail message identifying Media Fusion's bank account and numbers so money could be sent by wire. Count V is the actual one million dollar wire transfer from SCANA's bank account to Media Fusion's account and Count VI references an e-mail message asking for an additional one million dollars before July 1, 1999, sent from Media Fusion to SCANA.

In order for Stewart to be found guilty of wire fraud in violation of 18 U.S.C. § 1343, the government was required to prove the following elements beyond a reasonable doubt:

- (1) A scheme to defraud;
- (2) Use of an interstate wire in furtherance of the scheme; and
- (3) A material statement or omission in furtherance of the scheme.

At trial, the government failed to present substantial evidence from which a jury could find the existence of all three elements of the wire fraud charges alleged in Count I of the Indictment beyond a reasonable doubt. A scheme to defraud includes any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations or promises. Furthermore, the government was required to

prove beyond a reasonable doubt that Stewart intended to defraud, that is Stewart acted knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself at the expense of another. The evidence presented at trial established that Defendant Stewart had designed patented technology to allow the transmission of voice, data and other communications over the power line grid. The witnesses uniformly agreed that this technology was a passion of the Defendant Stewart and that his purpose was to fully develop this technology and to make it a commercial success.

At trial, the government conceded the existence of the technology, but charged that Stewart overstated the status of the development of the technology in an effort to obtain funds for further research. However, the evidence contradicted this theory. In fact, the single count that the jury returned a verdict of guilty alleged that a document entitled "Monthly Milestones and Budget for Media Fusion." was faxed from Texas to South Carolina. This document clearly establishes that significant research remained to be done.

The government also failed to prove that the wire transmission charged in Count I of the Indictment was in furtherance of the scheme to defraud that involved the specific material misrepresentations alleged in Paragraphs 4 through 9 of the Indictment. The government further failed to prove that the representations in Paragraphs 4 through 9 were both material and false.

As an initial matter, the wire transmission charged in Count I was faxed from Texas to South Carolina on March 6, 1999. The alleged representations contained in Paragraphs

6, 7 and 9 of the Indictment were made after March 6, 1999, and would therefore have been unrelated to the wire transmission charged in Count I.

Paragraph 4 of the Indictment alleges that Defendant Stewart "falsely represented that Media Fusion had developed a method of power line communication technology to provide voice, video and data communications over the electric power grid." This statement was proven to be utterly true at trial. Defendant Stewart introduced into evidence the patent that was issued by the United States Patent Office for this technology. (JA 795-812). This patented technology is for a method to transmit voice, data, and video over the power grid. In fact, no one claimed that Stewart did not develop a method of power line communication. The question raised at trial was whether this method had previously been proven to work. However, SCANA witnesses acknowledged that Stewart's power line communication solution had never been fully integrated and operated. Burwell acknowledged that Stewart stated that the technology needed to be tested on a power grid for full scale operations. Long conceded that Stewart represented that components of the technology had been tested but that the system had never been integrated. (JA 355, ll. 14-19). Again, the evidence established that the allegation of paragraph 4 was a true statement.

Paragraph 5 of the Indictment alleges that Defendant Stewart falsely represented that Media Fusion had completed the design and laboratory testing stages of its "proprietary network system" and "was well positioned to finalize the construction and installation of its first system." There was no evidence submitted at the trial that Stewart had not

completed the design and laboratory testing stages of its proprietary network system. First, the government did not produce any testimony about what the "proprietary network system" referenced in paragraph was. Government witness Kate Scoggins Travis testified that Stewart had a working computer model of a routing system. (JA 583, ll. 5-22). This was the only testimony about the existence or non-existence of a proprietary network system. Furthermore, Bob Long testified that Stewart told him that elements of the overall technology had been tested, but that the system had never been integrated. (JA 355, ll. 14-19). Therefore, the "proprietary network system" could not have been the fully integrated functioning transmission of communications over a power grid. There was simply no evidence that the representation pertaining to a proprietary network system was false. In addition, the statement that Media Fusion was "well positioned to finalize the construction and installation of its first system" was not proven to be false. In fact, George Bullwinkle admitted that Media Fusion's lack of a laboratory facility at Stennis did not raise any "red flags" following their visit to Stennis. (JA 720, ll. 13-25 to 721, ll. 15).

Paragraph 6 of the Indictment alleges that Stewart falsely represented his background and experience with MIT, DARPA, Microsoft and San Diego Gas & Electric. These references are set forth in the Power Point presentation presented to SCANA on April 15, 1999. There were no witnesses who testified that this Power Point presentation was made to anyone prior to April 15, 1999, or that the statements about Stewart's related experience were made to anyone at SCANA prior to March 6, 1999. In

addition, there was no evidence presented as to exactly what Stewart claimed his affiliation with MIT, DARPA, Microsoft and/or San Diego Gas & Electric was other than the references contained in the power point presentation. Subsequently, in Stewart's civil deposition, he explained his experience with the entities listed. (JA 450-452; 458-459). There were no witnesses who testified that Stewart contradicted the explanation given in the civil deposition at any point in time. Again, the government did not prove that these representations were false nor did the government prove that the representations were material.

Paragraph 7 of the Indictment alleges that Stewart falsely represented that he was a nominee for the Nobel Peace Prize. Stewart's resume contains a reference under "Honorable Mentions" that he was on the nominee list for the Nobel Prize in medicine. Stewart's resume was faxed to SCANA on April 12, 1999. There was no evidence presented that this resume was even prepared prior to March 6, 1999. The only SCANA witness to testify about any comments pertaining to a Nobel prize prior to March 6 was Bob Long who stated that Blair made "a comment that Luke would be a Nobel Peace Prize winner by this discovery in this technology that he had." (JA 301, ll 2-9) Clearly, this was not a statement of fact, but a prediction of a future event. Moreover, there was further evidence that Stewart traveled to Europe for the purpose of attending a meeting to be considered for the Nobel Prize. (JA 94, ll. 23-25 to 95, ll. 1-10; 508, ll. 5-13). Again, the government's burden was to prove that this representation was false and there was no evidence presented to establish such falsity or materiality.

Paragraph 8 of the Indictment charges that Stewart

falsely represented that Media Fusion was associated with, and had a laboratory at Stennis Space Center. These statements are referenced in the draft marketing document that Bullwinkle testified that obtained prior to SCANA making the loan on April 26, 1999. Bullwinkle did not, however, testify that he obtained the prior to March 6, 1999. Moreover, the only SCANA representatives that Stewart met with prior to March 6 1999, were Bullwinkle, Long and Burwell. Bullwinkle and Long visited Stennis Space Center and testified that there observations as to Media Fusions presence there matched their expectations.

Paragraph 9 of the Indictment claims that Stewart falsely represented that money received from SCANA would be spent testing the power line communication technology. This representation is derived from the April 26, 1999, letter of intent and without question postdates the March 5, 1999, facsimile transmission referenced in Count I of the Indictment. Again, the government failed to prove the falsity of this statement. As established through the overwhelming evidence at trial, the April 26, 1999, letter of intent by and between SCANA and Media Fusion stated that the money would be spent "towards" testing. Furthermore, SCANA's witnesses including George Bullwinkle testified that SCANA anticipated that the money would be used to raise additional money. (JA 721, ll. 6-10). In addition, the undisputed testimony was that "Phase I" of the project involved transmitting a continuous tone over the electrical grid in excess of 500 miles and that this would cost $25 million. Lastly, this representation was undeniably made after March 6, 1999.

In addition, the government cannot rely upon the

faxed document containing Monthly Milestones and Budget for Media Fusion referenced in Count I of the Indictment as the material false misrepresentation. The Indictment does not allege that this fax transmission itself was false. Rather, Paragraph 10 of the Indictment alleges that this fax transmission was transmitted for the purpose of executing the scheme to defraud.

Lastly, there was no evidence presented from which a jury could have found that Defendant Stewart caused the fax transmission referenced in Count I to be sent. The evidence established that Ed Blair faxed the monthly milestones and budget to Bob Long. No one testified that Luke Stewart knew of the existence of such document, created such document or caused such document to be faxed to anyone. In fact, as to the budget information, the evidence established that Ed Blair, in consultation with Stewart, prepared the budget.

Furthermore, witness Jesse Hanger testified that Ed Blair stated that he did not have "confidence" in the numbers contained in the budget. However, no one testified about Stewart's state of mind or knowledge about the budget figures or even the monthly milestone issues. (JA 480 ll 23-25 to 482 ll 1-9)

The government cannot rely upon other alleged misrepresentations that were not charged in the Indictment to support the jury's verdict on Count I. Defendant Stewart is guaranteed the right to have the charges against him presented to a Grand Jury. To uphold Stewart's conviction based upon the evidence in this record would necessarily require this Court to broaden the charges contained in the Indictment. This will amount to an impermissible variance in

violation of Stewart's constitutional rights. Because the government failed to present substantial evidence from which a reasonable jury could find Defendant Stewart guilty of charges alleged in Count I, this Court should enter judgment of acquittal.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE OF CORRESPONDENCE WRITTEN ON BEHALF OF NASA AND THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF MISSISSIPPI TO BLAIR

a. Standard of Review

A district court's evidentiary rulings are reviewed under the abuse of discretion standard." *United States v. Grimmond*, 137 F.3d 823, 831 (4th Cir.1998).

b. Argument

The government was allowed to introduce, over objection, a letter dated July 23, 1999 from a NASA attorney to Ed Blair complaining that Media Fusion is advertising a working relationship with NASA that does not exist. The letter references statements from a web site that are allegedly "flagrantly untrue." (JA 785 A, B). The letter states that such statements on your web site are representative of false claims that have been made by your company in its press releases and in meetings, conversations with, and materials provided to congressional offices. According to several of these offices which have contacted NASA, your vice president of Technology and Chief Scientist, William "Luke" Stewart,

had been the primary source of such statement." (JA 785 A, B) In addition, the government was allowed to introduce a letter from the United States Attorney for the South District of Mississippi to Blair stating that the "Attorney General of the United States has determined that your company is engaging in acts or practices which constitute conduce prohibited by section 310 of the National Aeronautics and Space Act by conveying the impression on your internet web sites that your business and products have some connection with or endorsement from the National Aeronautic and Space Administration (NASA) that does not in fact exist." (JA 785 C). The district court admitted these letters with a limited instruction that they could be used as evidence of notice.

Stewart objected to the introduction of these letters on three grounds. First, the letters contain references and quoted statements from a web site which does not exist nor were copies of the challenged statements saved or been produced and therefore the references to such a website in these letters violates the best evidence rule. Second, the letters were not relevant, because they were written after SCANA had made the loan to Media Fusion and there was no evidence that Stewart continued to make such representations after Media Fusion received these letters. Third, the letters should have been excluded under Fed.R.Evid. 403 because the probative value was substantially outweighed by the danger of unfair prejudice. (JA 256 ll.7-25 to 343 ll 1-19)

The best evidence rule provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as

otherwise provided in these rules or by Act of Congress." Fed.R.Evid. 1002. The district court upheld Stewart's objection regarding testimony as to the contents of website under the best evidence rule, but refused to redact that language referencing the web page. Such limiting instruction was not sufficient. Further, there was no evidence establishing that the statements that were the subject of NASA's complaints to Media Fusion were ever made to or observed by SCANA. In addition, there was no evidence that Stewart continued to make statements similar to the ones complained of by NASA to SCANA or anyone else following receipt of either the July 23, 1999 or September 2, 1999 letters. As a result the letters and testimony about the letters were not relevant to notice as to any issue in the trial. Moreover, to the extent that there was any probative value, it was outweighed by the danger of unfair prejudice. See, Fed. R. Evid. 403; *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997) (Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged."); *United States v. Mohr*, 318 F.3d 613, 619-20 (4th Cir.2003) (Rule 403 requires suppression of evidence that results in unfair prejudice--prejudice that damages an opponent for reasons other than its probative value). The District Court therefore abused its discretion in admitting this evidence.

□ III. THE DISTRICT COURT ERRED IN FINDING THAT THE AMOUNT OF LOSS FOR PURPOSE OF CALCULATING THE SENTENCING GUIDELINES WAS

$1 MILLION

a. Standard of Review

The District Court's interpretation of the term "loss," as used in the guidelines, is reviewed de novo; its calculation of the loss under the correct interpretation is reviewed for clear error. *United States v. Hughes*, 401 F.3d 540 (4 Cir. 2005); *United States v. Miller*, 316 F.3d 495, 498 (4th Cir.2003)

b. Argument

Stewart was given an 11 point enhancement for a loss exceeding $800,000 but less than $1.5 million under U.S.S.G. 2F1.1(b)(1)(L) because "the facts in this case reflect that, based on the defendant's fraudulent representations to SCANA Corp., they agreed to loan Media Fusion $1 million." (JA 916) Stewart objected to this enhancement on the basis that Stewart was acquitted of Count V of the Indictment which alleged the $1 million loan proceeds transfer from SCANA to Media Fusion. (JA 907). "Offense" is defined in Section 1B1 application note 1(h) as "the offense of conviction and all relevant conduct under 1B1.3." The offense of conviction in this instance is Count I. In Count I, there is no dollar amount of loss alleged. The dollar amount for which a loss is alleged is contained in Count V for which Stewart was acquitted. In addition, the $1 million cannot be applied to Stewart's sentencing guideline range under the rubric of "relevant conduct." The alleged $1 million loss was specifically charged in Count V, considered

and rejected by the jury. Furthermore, the government has not contended that any other defendant, beyond Defendant Blair who was also acquitted of Count V, defrauded SCANA of the $1 million. Therefore, the relevant conduct provision pertaining to jointly undertaken criminal activity is simply inapplicable.

Furthermore, to the extent the Court can consider conduct for which Stewart was found not guilty, the government must prove such conduct by a preponderance of evidence. Here, the government was required to prove that SCANA lost money as a result of the offense of conviction. First, SCANA prior to receiving the Monthly Milestones and Science Budget on March 6, 1999, drafted and executed a Mutual Non-Disclosure and No Obligation Agreement. This Agreement specifically provided that "communications of any kind should not be relied upon as a basis for taking any action, foregoing any opportunity or incurring costs." (JA 426, ll. 1-6). SCANA therefore could not and did not rely on the March 6, 1999, fax transmission to make the loan to Media Fusion. Second, even after SCANA's science review, visit to Stennis and full background investigation of Media Fusion and Stewart, SCANA continued to remain a "strategic partner in the investigation of this technology," according to an internal memorandum written to George Bullwinkle by Randy Mahan dated June 25, 1999. (JA 788). In addition, as of August 26, 1999, SCANA extended the payment date for the note and did not call the note due until January 26, 2000. (JA 790-794). There was no evidence that Defendant Stewart caused Media Fusion to fail to repay the loan. In fact, the evidence shows that Media Fusion raised additional capital and could have paid the note if its

management chose to do so. Stewart had been ousted by the Board of Directors by then.

In addition, the evidence established that the $1 million loaned to Media Fusion, LLC was used for legitimate business expenses, including the payment of salaries and lobbying fees received by people who were not even alleged to have been involved in an illegal scheme to defraud. Pursuant to Application Note 3(E), to Section 2B1.1, Stewart was entitled to a credit against the loss for the fair market value of services rendered by the defendant and other persons working in concert with the defendant. Clearly, substantial effort was put forth by the Media Fusion government relations firm and other Media Fusion employees in an attempt to commercialize Defendant's technology. As the evidence established, SCANA remained a "strategic" partner with Media Fusion while Media Fusion used the proceeds from the $1 million loan to further both companies' interests. If these efforts had been successful, SCANA stood to reap billions from its initial loan. The fact that these efforts failed to result in a material gain to SCANA does not mean that these services were worthless. The District Court erred by failing to give Stewart credit for the value of these efforts.

CONCLUSION

Appellant Stewart respectfully requests that his conviction be vacated and judgment of acquittal be entered as to Count I. Alternatively, Stewart request a reversal of his conviction based upon the District Court's evidentiary rulings and a remand for a new trial or for an order vacating

Stewart's sentence with instructions for re-sentencing based upon a proper application of the sentencing guidelines.

Respectfully submitted,

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Attorney for Appellant
Columbia, South Carolina February 23, 2006

CERTIFICATE OF COMPLIANCE

This Brief of Appellant has been prepared using:

Microsoft Word;

Times New Roman,

14 Point Type Space.

EXCLUSIVE of the Table of Contents, Table of Authorities, and the Certificate of Filing and Service, this Brief contains ___ pages.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.

/s/ James M. Griffin
Signature of Filing Party

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of February 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand-delivery, the required number of copies of the Brief of Appellant and Joint Appendix, and I further certify that I served, UPS Ground Transportation the required copies upon:

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Counsel for Appellee

The necessary filing and service upon Counsel were performed in accordance with the instructions given me by counsel in this case.

/s/
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Fourth Circuit Appeals Court Opinion (Unpublished)

09: *30* JUN 16, 2006 ID: US COURT OF RPF'ERLS
TEL NO: 916-2796 #48584 FRGE: 1/17

United States Court of Appeals for the Fourth Circuit

TO: James Mixon Griffin
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From: Barbara Rowe Phone 804-916-2704
Description: Number of Pages: 17
Time Sent: Friday, Jun 16, 2006 0 9:2 3 A.M.

JUDGEMENT FILED:

JUDGMENT FILED: J u n e 1 6, 2006 UNITED STATES COURT OF APPEALS for the Fourth Circuit No. 05-4493 CR-03-1088-CMC

UNITED STATES OF AMERICA Plaintiff – Appellee

v.

WILLIAM LUTHER STEWART, a/ k / a Luke Stewart Defendant - Appellant

Appeal from the United States District Court for the District of South Carolina at Columbia .....

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNPUBLISHED UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT UNITED STATES OF AMERICA, versus Plaintiff - Appellee, WILLIAM LUTHER STEWART, a/k/a Luke Stewart, Defendant - Appellant. Appeal from the United States District Court for the District of South Carolina, at Columbia. Cameron McGowan Currie, District Judge. (CR-03-1088-CMC) Submitted: May 16, 2006 Decided: June 16, 2006 Before NIEMEYER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge. Affirmed by unpublished per curiam opinion. James M. Griffin, Columbia, South Carolina, for Appellant. Reginald I. Lloyd, United States Attorney, Dean A. Eichelberger, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee. Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM: William Luther Stewart was convicted of wire fraud, in violation of 18 U.S.C. §1343 and 2, and the district court sentenced him to 30 months' imprisonment. The indictment charged that through a scheme and artifice to defraud, Stewart, together with his colleague, Edwin G. Blair, and their company, Media Fusion, LLC, obtained a loan of $1 million from SCANA Corporation, a company that owns South Carolina Electric and Gas, to fund implementation of a new technology that Stewart had allegedly developed. In particular, Stewart was charged with misrepresenting the fact that he had successfully developed a technology by which to transmit voice, video, and data over the power grid, and, to make his representations credible, with misrepresenting his credentials and his relationships with other major technology companies and institutions, such as MIT, NASA, the Defense Advanced Research Projects Agency, Microsoft, and San Diego Gas and Electric. The indictment

also charged that in furtherance of the scheme, Stewart and Blair sent a fax from Texas to SCANA in South Carolina, which contained projected monthly milestones and a budget for implementation of the technology. The jury found Stewart guilty of the charge, and the district court entered a judgment of conviction and the 30-month sentence on May 6, 2005.

On appeal, Stewart contends (1) that the evidence was insufficient to support the verdict; (2) that the district court abused its discretion in admitting letters from NASA and a U.S. Attorney in Mississippi, confirming, after the loan had already been made to Stewart, the inaccuracy of some of Stewart's misrepresentations; and (3) that the district court erred in $1 million-loss figure when Stewart was acquitted of the specific count charging that his scheme caused the transmission of $1 million from South Carolina to Texas. For the reasons that follow, we affirm.

I

Stewart contends first that the government failed to present evidence sufficient to convict him, arguing that there was no evidence that he created or directed the sending of the fax, that he participated in the misrepresentations, and that the misrepresentations were false. Taking the evidence in a light most favorable to the government, however, we believe that there was substantial evidence to support Stewart's conviction. Even though the fax was sent by Blair, the jury could reasonably have believed that Stewart directed Blair to send the fax or that he assisted Blair in doing so. Stewart and Blair were the two principals of Media Fusion and were constant companions in obtaining the loan from SCANA. The fax furthered the scheme to defraud SCANA because SCANA officials requested the financial information contained in the fax before they made their loan and testified that they would not have loaned

Media Fusion the $1 million if they had known that the technology was not ready for immediate installation. The fax implied that it was developed and ready for installation because the fax minimized future costs for research and development and forecasted revenue-producing consumer use within 12 months of the loan. In addition, the jury could reasonably have agreed with SCANA officials who testified that Stewart constantly led them to believe that the technology was more fully developed than it actually was. The officials stated that Stewart had told them that the technology was "proven technology" capable of near-term commercialization. The evidence showed that in actuality, however, Stewart had never tested the technology on a power line to prove it could pass digital signals through transformers. Even if the jury believed Stewart that he had done some testing, he testified that he had only tested some individual components of the technology, and not the technology as a whole. In light of the testimony that SCANA officials told Stewart they only were interested in ready-to-market technology, the jury could have inferred an intent to defraud from Stewart's repeated misrepresentations. From our review of the record, we conclude that the jury had ample evidence on which to convict Stewart on the § 1343 charge.

II

Stewart also contends that the district court abused its discretion in admitting into evidence a 1999 letter from NASA and a 2000 letter from the Department of Justice because the letters were dated after SCANA had made the $1 million loan to Media Fusion. The government, however, offered the letters to demonstrate that part of the scheme included Blair's misrepresentations about Media Fusion's relationship with NASA made to forestall SCANA from recalling the $1 million loan. We agree that these

letters were relevant evidence of intent to mislead SCANA with the "design[] to lull the victims into a false sense of security [and] postpone their ultimate complaint to the authorities." United States v. Lane, 474 U.S. 438, 451-52 (1986) (quoting United States v. Maze, 414 U.S. 395, 403 (1974)). We disagree with Stewart's contention that the letters were also unduly prejudicial because they contained indirect evidence of matters on Media Fusion's website. The district court agreed with Stewart in noting that the letters' references to information found on a website failed the best evidence rule. The court received them, however, for a limited purpose and not for the substantive evidence of the content of Media Fusion's website, and in order to be sure that the documents were received for that limited purpose, the district court gave the jury a limiting instruction. In these circumstances, we do not believe that the district court abused its discretion.

III

Finally, Stewart contends that the district court erred in calculating the amount of loss in determining his sentencing guidelines range. Finding that SCANA's $1 million loan was "the value of the money, property, or services unlawfully taken," U.S.S.G. § 2Fl.l App. Note 8 (Nov. 1998). the district court increased Stewart's offense level 11 levels, resulting in a sentencing guideline range of 30-37 months' imprisonment. Stewart argues that because he was not convicted of Count which charged him with wire fraud for SCANA's $1 million loan, the court could not consider the amount of the loan as relevant conduct. The jury's acquittal, however, was based on a failure of proof under a standard of beyond-a-reasonable-doubt, and in sentencing, the district court need only have found the loss of the $1 million by a preponderance of the evidence. Accordingly, in determining the appropriate sentencing

guideline, the court was entitled to consider acquitted conduct as relevant conduct. See United States v. Watts, 519 U.S. 148/ 157 (1997). Moreover, the evidence supported the finding that $1 million was the proper amount of loss. Application Note 8 to U.S.S.G.§ 2Fl.l (Nov. 1998) explains that in determining the loss, the court should consider the commentary to U.S.S.G. § 2B1.l, which provides that "Where the offense involved making a fraudulent loan or . . . other unlawful conduct involving a loan . . . the loss is to be determined under the principles set forth in the commentary to section 2Fl.l," U.S.S.G. § 2Bl.l App. Note 2 (Nov. 1998). The commentary to § 2Fl.l describes how the nominal loss - - in this case the amount of the loan - - can overstate the actual loss when the defendant has repaid some of the loan or collateralized it with property that is not worthless. See U.S.S.G. § 2Fl.l App. Note 8 ("If a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan"). The district court, however, concluded that there were no such offsets because as of sentencing the loan remained uncollected and because Media Fusion had provided no collateral.

Stewart argues that SCANA was effectively a "'strategic' partner" with Media Fusion and thus recovered some value from the loan because SCANA put the money to use in the common enterprise "in an attempt to commercialize defendant's technology." The district court, however, reasonably found that SCANA received no offsetting value from these efforts. The technology never became commercially viable and never provided any benefit to SCANA.

Because there was no repayment of the loan, no collateral to secure its repayment, or no other expectancy to

reduce its outstanding amount, the district court did not clearly err in finding for sentencing that the loss was $1 million.

* * *

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court) and argument would not aid in the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
JULY 11, 2006

No. 05-4493
CR-03-1088-CMC

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

WILLIAM LUTHER STEWART,
a/k/a Luke Stewart

Defendant - Appellant

ORDER

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing. Entered for a panel composed of Judge Niemeyer, Judge King, and Senior Judge Hamilton

For the Court,

/s/ Patricia S. Connor

Clerk